

CEPS COMMENTARY



Thinking ahead for Europe

A European Border and Coast Guard: Fit for purpose?

Sergio Carrera and Leonhard den Hertog

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In December 2015, The Commission proposed to set up a European Border and Coast Guard (EBCG) as one of the key responses to the 2015 ‘refugee crisis’. The initiative intends to give Frontex, the EU’s current border agency, more competences, staff and equipment, and to rename it the EBCG. The new EBCG would work together with the member states’ national border and coast guard authorities.

The European Council Conclusions of February 18th on Migration called for the negotiations of the proposal to be accelerated with a view to reaching a political agreement during the Dutch Presidency so that the new agency will be operational as soon as possible. [The Justice and Home Affairs Council](#) meets on Thursday, 25 February 2016 to discuss these proposals.

Our forthcoming CEPS paper¹ critically assesses this proposal against the background of Frontex responses at the external borders in 2015, namely the ‘Triton’ and ‘Poseidon’ Joint Operations and the ‘Hotspots’ systems in Italy and Greece. It asks whether **the proposed EBCG will constitute a true European border and coast guard capable of addressing the needs on the ground**. We contend that the EBCG would neither lead to a truly ‘European’ border and coast guard, nor would it address a glaring deficiency in the EU’s response to crisis throughout last year: the inadequate reception conditions and procedures for processing applications from asylum-seekers inside the EU.

Key Findings

First, the proposal builds on the current Frontex Regulation, revamping the Agency into a *Frontex+* and assigning it more competences meant to address the shortcomings in the Agency’s current work: insufficient (human and equipment) capacities and a lack of cooperation by some member states.

These new competences would include a ‘right to intervene’, entailing the sending of European border guard authorities from other member states to a common EU external border without needing to obtain the consent of the member state concerned.

¹ Sergio Carrera and Leonhard den Hertog (forthcoming 2016), “A European Border and Coast Guard: What’s in a name?”, CEPS Paper in Liberty and Security in Europe No. 88, CEPS, Brussels.

Sergio Carrera is Senior Research Fellow and Head of the Justice and Home Affairs unit at CEPS, and Associate Professor and Senior Researcher at the University of Maastricht. Leonhard den Hertog is TRANSMIC postdoctoral researcher at the Justice and Home Affairs unit at CEPS.

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Frontex has encountered difficulties in the past in calling up [enough national border guards](#) from member states to meet its needs. The EBCG proposal envisages more mandatory member state contributions to the agency “pools”, including a “rapid reserve pool” of EBCG Teams, consisting of a “standing corps” of a minimum of 1,500 national border guards to which member states “shall make available” 2-3% of their national border and coast guard officers. The EBCG would have the competence to place Liaison Officers in member states.

Nonetheless, the EBCG does not establish an agency with its own ‘European’ border guards who would be responsible for ensure a constant and uniform application of EU law (the Schengen Borders Code) across *all* EU external borders.

The EBCG would also depend on the active cooperation by concerned EU member states. The member state and the new agency would still need to agree on an operational plan and national officers and assistance would still be needed to be able to implement any form of operational cooperation.

The legal basis of the EBCG proposal is sound, including when it comes to ‘the right to intervene’. Art. 77.1.d TFEU grants the power to the EU to adopt “any measure” necessary for gradual establishment of an integrated border management system for external borders. This provision could also be read in light of Art. 4.3 TEU, as it would strengthen member states’ compliance with the principle of sincere and loyal cooperation under EU borders law.

It is of concern that the complaint mechanism envisaged by the EBCG proposal in cases of alleged fundamental rights violations does not ensure independence and therefore would not qualify as an effective remedy for individuals. This is particularly problematic when it comes to the envisaged new responsibilities on [returning refugees to their home countries](#).

Second, the 2015 refugee crisis exposed deficiencies in structural and administrative capacities across member states in complying with EU border and asylum standards.

Without systematically addressing these deficiencies in domestic capacity, the EBCG proposal would add a reinforced Frontex in a working environment on the ground that is unable to take up and connect to the EBCG work.

In September 2015, the European Commission launched 40 infringement proceedings against EU member states for incorrect transposition and implementation of common European asylum standards. These proceedings, however, should not be a simple ‘legal check’ of [national transposition](#).

Attention should be instead paid to the extent to which the conditions are present for effective and practical implementation of these EU legal standards. Particularly problematic in this regard are the profoundly [inadequate first-reception conditions](#) for asylum-seekers and the implementation of the [Receptions Directive 2013/33](#).

The 2015 responses have shown that the agency can coordinate Joint Operations and help set up ‘[Hotspots](#)’ in Italy and Greece. But without up-to-standard national reception and asylum systems in place on the ground, those intercepted and registered cannot be directed anywhere. Relocation of asylum-seekers proves to be particularly problematic under those circumstances.

Third, the EBCG aims to re-position Frontex at centre stage for coordinating information exchange and operational cooperation between member state border authorities and other authorities with coast guard functions.

In examining which authorities have ‘coast guard functions’, our paper finds that it varies from one [member state to another](#) – depending on the authority(ies) engaged in coast guard functions and responsible Ministry(ies). In several Mediterranean countries, e.g. Spain, Portugal, Italy and Malta, such authorities include military and/or para-military actors. These

are not the usual Schengen border authorities, which, according to the [EU Schengen Catalogue](#), should be civilian in nature.

The EBCG proposal aims at reinforcing Frontex's points of entry into (non-Schengen) maritime border surveillance cooperation and information exchange, based on networks of authorities with coast guards 'functions'. This development would raise questions as to how these actors and networks will comply with key EU rule of law standards governing borders, asylum and human rights while engaged in activities coordinated by the EBCG: who would be responsible in the event of incidents and fundamental rights violations? This question will be particularly pertinent in relation to [search and rescue \(SAR\)](#) operations at sea.

An illustration of the accountability dilemma in involving military actors in migration-related matters is the EU's Common Security and Defence Policy operation called [EUNAFVOR MED Sophia](#), which operates just south of JO Triton's operational area.

Particular attention should be paid to the way in which the modalities of cooperation between the EBCG agency and the European Fisheries Control Agency and the European Maritime Safety Agency will be delineated. Although more information exchange and operational cooperation amongst the different policy networks and actors are foreseen, it remains to be seen whether the long-standing tensions between the various national authorities performing border management functions will be overcome.

Fourth, the EBCG initiative indicates a misguided EU policy priority focused on external border controls, return and cooperation with third countries as the 'solutions' to the refugee crisis.

This focus comes at the expense of EU actions to address asylum, humanitarian and human rights challenges and opportunities to enhance EU institutional solidarity. It also prevents giving a strong priority to common [policies which fight against intolerance, fear and xenophobia vis-à-vis against refugees and migrants](#).

The presence of EASO (European Asylum Support Office) at the hotspots in Italy and Greece has been [underwhelming](#). Only eight member-state experts have been sent in all of Italy, and 12 member-state experts and one EASO staff member have been dispatched to Greece.

We welcome the reference in the February 2016 European Council Conclusions on Migration (point 7.g) to the need to boost the capacity for the EU to provide humanitarian assistance internally. This assistance should go hand-to-hand with efforts to ensure EU institutional solidarity and the faithful observance of European standards within the scope of EU asylum law on reception.

It is particularly in this latter domain that EASO could play a stronger role. Alongside any reinforcement of the Frontex mandate, a serious discussion is needed on boosting the role and competences of EASO in safeguarding access to reception and asylum across the Union and moving beyond the current EU Dublin system.